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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 85

CITIES SERVICE GAS COMPANY, A CORPORATION,
Appellant

v.

STATE CORPORATION COMMISSION OF KANSAS, MARION BEATTY, CHAIRMAN, RICHARD C. BYRD AND HARRY G. WILES, AS MEMBERS OF SAID COMMISSION, AND THEIR RESPECTIVE SUCCESSORS IN OFFICE, *Appellees*

On Appeal from the Judgment of the Supreme Court of the State of Kansas

BRIEF OF THE ATTORNEYS GENERAL OF THE STATES OF ARKANSAS, COLORADO, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, TEXAS, UTAH AND WYOMING, AMICI CURIAE

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INDEX

Page

Statement 1

Argument:

I. Jurisdiction of the States over Gas Production Is Limited Only by the Commerce Clause of the Constitution, Whereas Federal Jurisdiction Is Further Circumscribed by the Limitations of the Natural Gas Act 4

II. The Kansas Order Does Not Conflict With Federal Power Commission Regulations 19

Conclusion 22

CITATIONS

CASES:

Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8 6

Champlin Refining Co. v. *Corporation Commission of Oklahoma*, 286 U.S. 210 6

Cities Service Gas Company v. *State Corporation Commission of Kansas, et al.*, 180 Kan. 454, 304 P. 2d 528 1

City of Yonkers v. *United States*, 320 U.S. 685 16

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581 ..... 4, 7, 9

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U S. 515 ..... 5, 15, 16, 17

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464 ..... 4, 5

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591 ..... 4-5, 7

Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 ..... 4, 7, 8, 15

Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349 16

Florida v. *United States*, 282 U.S. 194 16

Page

Henderson County v. *Thompson*, 300 U.S. 258 6
Hope Gas Co. v. *Hall*, 274 U.S. 284 ..... 12, 14
Illinois Natural Gas Co. v. *Central Illinois Public Service Co.*, 314 U.S. 498 5
Interstate Natural Gas Co. v. *Federal Power Commission*, 331 U.S. 682 ..... 4, 7, 21
Lindsley v. *Natural Carbonic Gas Company*, 220 U.S. 61 6
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 ..... 10, 11, 14
Natural Gas Pipeline Co. of America v. *Panoma Corporation*, 349 U.S. 44 ..... 2, 10-11, 12, 14
Ohio Oil Co. v. *Indiana*, 177 U.S. 190 6
Oliver Iron Mining Co. v. *Lord*, 262 U.S. 172 13
Palmer v. *Massachusetts*, 308 U.S. 79 16
Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507 ..... 4, 7
Parker v. *Brown*, 317 U.S. 341 6
Pennsylvania Gas Co. v. *Public Service Commission*, 252 U.S. 23 6
Phillips Petroleum Company v. *State of Wisconsin*, 347 U.S. 672 ..... 4, 5, 10, 11
Public Utilities Commission of Ohio v. *United Fuel Gas Co.*, 317 U.S. 456 ..... 7, 20
Public Utilities Commission of Rhode Island v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 6
State of Missouri v. *Kansas Natural Gas Co.*, 265 U.S. 298 6
Thompson v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55 6
Utah Power & Light Co. v. *Pfost*, 286 U.S. 165 ..... 12, 14, 15
Walls v. *Midland Carbon Co.*, 254 U.S. 300 6

STATUTES:

Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended 16 U.S.C. 791, *et seq.* 15

Natural Gas Act of June 21, 1938, 52 Stat. 821, 15 U.S.C. 717, et seq. 2
Section 1(b) (15 U.S.C. 717(b)) 4, 8, 12, 16
Section 7(b) (15 U.S.C. 717f(b)) 9

MISCELLANEOUS: Page

Code of Federal Regulations, Title 18, C. I:
Section 154.91 through 154.102 19
Section 157.23 19
Section 157.29 19
Section 157.30 19
Federal Power Commission Order 180, issued June 30, 1955 20
Federal Power Commission Order 197, issued May 23, 1957 20
H. Rep. No. 2651, 74th Cong., 2d Sess. 7
H. Rep. No. 709, 75th Cong., 1st Sess. 7
Sen. Rep. No. 1162, 75th Cong., 1st Sess. 7

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STATEMENT

This brief of amici curiae urging affirmance of *Cities Service Gas Company* v. *State Corporation Commission of Kansas, et al,* 180 Kan. 454, 304 P. 2d 528, is filed by the undersigned, Attorneys General for and on behalf of their respective States.

Notwithstanding the fact that the sole question presented on appellate review to the Supreme Court of Kansas was whether, "in the light of the facts and circumstances of record, the Commission [State Corporation Commission of Kansas] had no jurisdiction to issue the minimum value attribution and/or price order in question because the sole and exclusive jurisdiction to make such order is vested in the Federal Power Commission under the Natural Gas Act, 15 U.S.C.A. Sec. 717 et seq;" (R-96), we observe on the first page of the index to the brief for the Federal Power Commission as amicus curiæ the startling assertion that the "order of the Kansas Corporation Commission directly *affects* the price of natural gas sold in interstate commerce, and is *therefore* an invalid exercise of state authority." (Emphasis supplied).[1] The Federal Power Commission's brief repeats this contention (p. 29) and even goes so far as to cite this court's holding in *Natural Gas Pipeline Co. of America* v. *Panoma Corporation*, 349 U.S. 44 for the proposition that "any action by a state regulatory body which interferes with this [Federal Power Commission] jurisdiction is therefore proscribed." (pp. 30-31)

The assertion that a constitutionally valid state conservation order must be stricken down because of possible interference with the "rights," of the Federal Power Commission is of sufficient importance in itself and in its implications to challenge the grave concern of all of the States and the Attorneys General representing them. However, the Federal Power Commission in its amicus brief goes even further by represent-

[1] Severance tax measures and a great many conservation measures directly affect the price of gas and therefore, under the Federal Power Commission's theory, all such measures would be jeopardized.

ing to this court that "The primary purpose of the Natural Gas Act is to subject all sales of natural gas in interstate commerce for resale to regulation by the Federal Power Commission" (Caption, p. 10 of Federal Power Commission brief), and that in enacting the Natural Gas Act the Congress "has enacted a complete scheme of regulation * * * states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations." (p. 32)

Such all-encompassing preemptiveness on the part of the Federal Power Commission vis-a-vis state regulation is, in our view, contrary to the limitations inherent in the Natural Gas Act, to the Act's well defined legislative history, and to this court's decisions interpreting the same. Moreover, such asserted jurisdictional aggrandizement encroaches upon and poses a serious threat to the well established prerogatives of the individual states in the fields of taxation and regulation of oil and gas production. What the appellant and the Federal Power Commission have asked the court to do here is not to fill a gap in the state's power to regulate, for there is none, but to force a breach in the state's constitutionally valid powers to regulate in order to make room for federal power. For these reasons these Attorneys General, on behalf of their respective states, have requested permission to present their views on the issues involved in this appeal.

ARGUMENT

I.

Jurisdiction of the States Over Gas Production Is Limited Only by the Commerce Clause of the Constitution, Whereas Federal Jurisdiction Is Further Circumscribed by the Limitations of the Natural Gas Act.

Without entering upon another extended review of the judicial decisions defining the jurisdictional limitations contained in Section 1(b) of the Natural Gas Act, or of the legislative history surrounding that Act, this court has advised us plainly that "the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies." *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502.

The primary purpose of the Natural Gas Act "was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business."[2]

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[2] *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672, 682, citing: *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 472-473; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502-504; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 514-521; *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689-693; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 599-600; *Federal Power Commission* v.

This "gap" in regulation adverted to by the court, of course, refers to that thought to exist in 1938 at the time the Natural Gas Act was passed.[3] What then was

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Hope Natural Gas Co., 320 U. S. 591, 609-610; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 506-508.

In its amicus curiae brief, the Federal Power Commission would ignore these clear holdings respecting the overriding Congressional purposes of the Natural Gas Act where it argues with apparent earnestness (p. 10) that "the primary purpose of the Natural Gas Act is to subject all sales of natural gas in interstate commerce for resale to regulation by the Federal Power Commission." It should be pointed out that regulation is a means, and not an end in and of itself. To use the charitable words of Mr. Justice Jackson in his dissenting opinion in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 488 (cf. his opinion for the majority in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515): "I can well understand the zeal of the Federal Power Commission to expand its control over the natural gas industry. It sprawls over many states and each system must be physically integrated from the depths of the wells to the consumer's burner tips. Its regulation cannot be uniform if the Federal Commission controls only a middle segment, with production on one end and distribution on the other committed to the control of different states. But that was as far as Congress was willing to supersede state authority. It left the peculiar problems affecting production to the producing states, it left the ultimate protection of consumers to the consuming states, and it left the Federal Power Commission in the middle to fix the r tes for gas moving between the two. This obviously subdivides regulation of what has to operate as a unitary enterprise, but that is often the consequence of our federal system. Whatever we may think would be wise policy in this field, the Act which Congress passed places limitations upon the Power Commission, which may chafe but which neither we nor the Commission are free to override. If the Commission had foreshadowed its present course, I do not suppose the Act would have passed, for it certainly would have evoked resistance of the state regulatory agencies instead of their support."

[3] *Phillips Petroleum Co.* v. *Wisconsin*, supra, p. 684; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 508; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U. S. 464, 472.

the "gap" sought to be filled? The Federal Government in its undoubted power over interstate commerce had not acted, and the states were precluded from exercising their regulatory authority over the natural gas fields only by such decisions as *State of Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298; and *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83.[4]

Conversely, by 1938 there existed no insurmountable constitutional inhibitions which prevented the states from protecting the public interest in its undoubted powers to regulate the production of natural gas,[5] even though such regulating to some extent affected interstate commerce. *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23. Also see *Parker* v. *Brown*, 317 U.S. 341.

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[4] In none of the cases was it suggested that a producing state might not regulate the production and gathering of natural gas. The subject under consideration was that of state power over wholesales "not local in character" *and* (this is the important limitation) "even in the absence of Congressional action, not subject to state regulation."

[5] *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 206 where this court quotes with approval: "The local character of such a substance as natural gas is, we repeat, marked and peculiar. It is a natural product, and its source is in the soil or rocks of the earth. It is as strikingly local as coal or petroleum; and yet no one has ever questioned the power of a state to enact laws governing mining. . . . It is so essentially local that only local regulation can be effective or appropriate. It is found in very few localities, and the character of locality is impressed upon it more clearly and strongly than upon almost any other natural product in the world." *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210; *Henderson County* v. *Thompson*, 300 U. S. 258; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55.

The opinions of this court have made it abundantly clear that "Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess." *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, at page 467.[6]

In each of the *Hope, Colorado Interstate, Interstate Natural Gas Company,* and the *Panhandle* cases, in which the "production or gathering" exemption was considered in relation to rate making or price fixing, this court consistently made a careful distinction between rate regulation, which was delegated to the Commission, and regulation of the "producing properties and gathering facilities", and the "activity of producing and gathering natural gas," over which the Commission was given no power.

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[6] The Supreme Court has further recognized the essentially local interests of the state in the regulation of the natural gas industry in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, at page 612; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, at page 602; *Interstate Natural Gas Corp.* v. *Federal Power Commission*, 331 U. S. 682, at page 690; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, at pages 517-520; and *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, at pages 509-513.

The distinction between rate making and control over production and gathering was sharpened in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company,* 337 U.S. 498 (1949). In that case the court vigorously applied the "production or gathering" exemption as a limitation upon the power of the Commission, holding that the Commission has no authority to regulate the disposition, by a gas pipe-line company admittedly subject to the Act, of a substantial part of such company's gas reserves. This court so held notwithstanding the fact the company had obtained certificates of public convenience and necessity from the Commission by representing that it had the reserves in question. The District Court, Court of Appeals, and Supreme Court uniformly held that the exclusion in Sec. 1(b) of the Act of "the production or gathering of natural gas" left the transfer of gas leases completely outside the scope of the Commission's powers. The Supreme Court said:

> "Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather, it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the State regulatory bodies. Accordingly, Congress in Sec. 1(b) of the Act not only prescribed the intended reach of the commission's power, but also specified the areas into which this power was not to extend." Pp. 502-503.

Significantly, this court made clear that the "production or gathering" exemption includes not only the

activities of producing or gathering gas, but also the *facilities* used in production or gathering. The court said:

> "The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities, such as reserves and gas leases, used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the section specifically exempts both the local distribution and the facilities used therefor while it makes no mention of the facilities for production or gathering. In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.' In Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 603, we said that this phrase comprehended the producing properties and gathering facilities of a natural-gas company. We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent. Of course leases are an essential part of production." Pp. 504-505.

The Commission contended that it had the power in question under Sec. 7(b) of the Act, because of its effect upon the Commission's jurisdiction over transportation and sale. The Supreme Court said:

> "The Federal Power Commission leans heavily upon Sec. 7(b) which provides that no natural-gas company may abandon any of its facilities subject to the jurisdiction of the Commission without the prior approval of the Commission. The argument here is that since natural gas is the 'life-blood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commis-

sion control, may render itself unable to continue service; consequently, abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. The section * * * covers only 'facilities subject to the jurisdiction of the Commission.'

"*To accept these arguments springing from power* to allow interstate service, fix rates and *control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area.* It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the State legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement State power and to produce a harmonious and comprehensive regulation of the industry. Neither State nor Federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution. It considered the State interests as well as the national interests. *It had both producers and consumers in mind.* Legislative adjustments were made to reconcile the conflicting views." Pp. 508-513. (Emphasis added.)

Nor do the decisions in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U.S. 672, *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, and *Natural*

Gas Pipeline Co. v. *Panoma Corporation*, 349 U.S. 44, overrule these prior cases, but rather they illustrate the point that the jurisdiction of the states over gas production is limited only by the commerce clause of the Constitution while federal jurisdiction is further circumscribed by the limitations of the Natural Gas Act.

In *Phillips Petroleum Corporation* v. *State of Wisconsin*, 347 U.S. 672, this court held that wholesales of natural gas in interstate commerce for resale are subject to the jurisdiction of and regulation by the Federal Power Commission, where such sales are made at the outlet of a processing plant and production, gathering, and processing have closed and transmission in interstate commerce has begun. At the same term of court, it was held in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, that a Texas tax on "gathering gas" as applied to an interstate natural gas pipe line company was invalid where the incidence of the tax was delayed beyond the step where production, gathering, and processing have ceased and transmission in interstate commerce has begun. Again in *Natural Gas Pipeline Co.* v. *Panoma Corporation*, 349 U.S. 44, this court held that a state may not fix a minimum price to be paid for gas, *after its production and gathering has ended*, by a company which transports the gas for resale in interstate commerce. The import of these decisions is that the states had no power in 1938 to regulate the sales, or to tax the taking of natural gas at the tailgate of a processing plant where such gas was sold wholesale in interstate commerce for resale and the production, gathering, and processing had been completed; that the Congress had expressly delegated regulatory powers to the Federal

Power Commission only over the transportation in interstate commerce and sale in interstate commerce for resale, which are the only areas covered by the primary grant; and that these delegated powers over such sales were not delimited by the express words of Section 1(b) of the Natural Gas Act.

In parallel cases involving the state's power to tax this court in two cases, decided prior to the passage of the Natural Gas Act, held that a tax on the business of producing natural gas *computed on the value of the gas at the well* did not burden interstate commerce and thereby conflict with the commerce clause, *Hope Gas Co.* v. *Hall*, 274 U.S. 284;[7] and that a state license tax on the electricity produced at a plant within the state is valid under the commerce clause as applied to that which is transmitted therefrom and sold to consumers in another state. *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165. In this latter case, the appellant con-

[7] It is interesting to note that in that case, the appellants argued, as does Cities Service Gas Company and the Federal Power Commission here, that the statute might be construed to place an unlawful burden upon interstate commerce. This court disposes of such contentions by stating, at p. 288: "But we review the final decree and must accept the statute as authoritatively construed and applied [by the Supreme Court of Appeals of West Virginia]. The plain result of the opinion and final decree is to require that the tax be computed *upon the value of the gas at the well, and not otherwise*. If, hereafter, executive officers disregard the approved construction and fix values upon any improper ba[illegible] appropriate relief may be obtained through the courts." [Emphasis supplied] So in the present case, the incidence of the Kansas Conservation order, as authoritatively construed and applied by the Supreme Court of Kansas, occurs prior to the production of natural gas, and if, hereafter, the State Corporation Commission of Kansas disregards the approved construction upon any improper basis appropriate relief may be attained through the courts. *Natural Gas Pipeline Company* v. *Panoma*, 349 U. S. 44.

tended, as the appellant does in these proceedings, that the state regulation (tax) was not one on manufacture or production, or on the extraction of a product of nature, but on the transfer or conveyance of energy in nature from its source to its place of use. This court disposed of such contentions by holding:

> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. In transmitting the product across the state line into Utah, appellant is engaged in interstate commerce, and state legislation in respect thereof is subject to the paramount authority of the commerce clause of the federal Constitution. The situation does not differ in principle from that considered by this court in *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172. There the State of Minnesota had imposed an occupation tax on the business of mining ores. The tax was assailed as being in conflict with the commerce clause. It appeared that substantially all the ores there in question were mined for delivery to consumers outside the state; and that the ores passed practically at once after extraction into the channels of interstate commerce. The greater part of the ores came from open pit mines, to which empty cars were run and there loaded, the ores being severed from their natural bed by means of steam shovels and lifted directly into the cars. When loaded these cars were promptly returned to the railroad yards from which they came and were there put into trains and continued their interstate journey. The several steps followed in such succession that there was practical continuity of movement from the severance of the ores to the end of their journey in another state. Upon these facts the court held that the commerce clause was not infringed.

> " 'The ore does not enter interstate commerce,' it was said, p. 179, 'until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference.' "

The *Pfost* case was urged upon this court in the *Calvert* case, *supra*, but distinguished upon two grounds: First, this court said (p. 166) the Calvert case "is not whether the State could tax the actual gathering of all gas whether transmitted in interstate commerce or not, cf. *Hope Natural Gas Co.* v. *Hall*, *supra*, but whether here the State has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun. Cf. *Utah Power & Light Co.* v. *Pfost*, *supra*. The incidence of the tax here at issue, as stated by the Texas appellate court, is appellants' 'taking' of gas from Phillips' gasoline plant. This event, as stipulated, occurs after the gas has been produced, gathered and processed by others than appellants.", and Second: The tax as applied would permit a multiple burden upon that commerce.

By a parity of reasoning, the difference between the *Panoma* case and the present one is as apparent as the distinction between the *Calvert* case and the *Pfost* case. In *Panoma*, Oklahoma had attempted to fix a minimum price to be paid for natural gas, after its production and gathering had ended, by a company which transports the gas for resale in interstate commerce. Like the *Calvert* case, the incidence of state power came too late after production, gathering and

processing had ceased and the interstate transmission had commenced.

In the present case, Kansas has entered a constitutionally valid conservation order which takes effect prior to the completion of gathering and processing, and even prior to the first steps towards actual production. As in the *Pfost* case, so in the instant proceeding, without regard to future movement, producers of natural gas in Kansas may, in effect, be engaged in two or more activities, not in one only. So far as they produce gas in Kansas, their business is purely intrastate, subject to state taxation and control.

Not only has the Federal Power Commission not been granted any jurisdiction over such intrastate activities, but the Natural Gas Act affirmatively states that its terms shall *not* apply to the production or gathering of gas. The primary grant of jurisdiction to the Commission was specifically limited to transportation in interstate commerce and sale in interstate commerce for resale. Even this primary grant was limited so that it would not apply to the production or gathering of gas.

Twice before, the Federal Power Commission urged this court to attribute to it certain "implied" or "necessary" powers in the face of specific congressional denials of such powers. The first such attempt to establish wide control by the Federal Power Commission over the production and gathering of gas came before this court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, discussed above.

In an analogous case under the Federal Power Act, *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, this same Commission also attempted to expand its power into other phases of the

forbidden area. There, as it did in the Panhandle case, this court made it very clear (at page 532) that "where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone." Citing: *City of Yonkers* v. *United States,* 320 U.S. 685, 692; *Florida* v. *United States,* 282 U.S. 194, 211-212; cf. *Palmer* v. *Massachusetts,* 308 U.S. 79, 84; *Federal Trade Commission* v. *Bunte Bros.,* 312 U.S. 349, 351.

As in the *Connecticut Power* case, so in the instant proceeding, "Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped." In that case, as it does in the present proceedings, the Federal Power Commission attempted to extend its powers to the product's source of the energy, even though the Federal Power Act had prescribed that the Commission shall have jurisdiction over all facilities for the transmission or wholesale of electric energy in interstate commerce, "*but shall not* have jurisdiction, except as specifically provided in this Part and the Part next following . . . over facilities used in local distribution." There, this court made short shrift of the Federal Power Commission's contention in language which is equally applicable to the jurisdictional limitations of Section 1(b) of the Natural Gas Act, i.e. "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . *but*

shall not apply . . . to the production or gathering of natural gas." This court states (pp. 528-529):

> "It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shall not' is usually rendered as to forbid and we think here it was employed without sublety or contortion and in its usual sense. If otherwise in doubt this provision should be read in harmony with the policy provision. So read, its terms seem plainly to state circumstances under which the Commission shall not have jurisdiction. As such it is the provision which loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commission must observe and the courts must enforce."

In reversing *Connecticut Light & Power Co.* v. *Federal Power Commission*, this court recognized that the states are not mere satrapies of the Federal Power Commission where taxation and conservation of the states' natural resources are concerned (pp. 529-531):

> "It has never been questioned that technologically generation, transmission, distribution and consumption are so fused and interdependent that the whole enterprise is within the reach of the commerce power of Congress, either on the basis that it is, or that it affects, interstate commerce, if at any point it crosses a state line. Such a broad and undivided base for jurisdiction of the Power Commission would be quite unobjectionable and perhaps highly salutary if the United States were a unitary government and the only conflicting interests to be considered were those of the regulated company.

"But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed. Congress may think it expedient to avoid clashes between state and federal officials in administering an act such as we have here. Conflicts which lead state officials to stand shoulder to shoulder with private corporations making common cause of resistance to federal authority may be thought to be prejudicial to the ends sought by an act and regulation more likely to be successful, even though more limited, if it has local support. Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment.

"But whatever reason or combination of reasons led Congress to put the provision in the Act, we think it meant what it said by the words 'but shall not have jurisdiction, except as specifically provided in this Part or the Part next following . . . over facilities used in local distribution.' Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry. To define the scope of state controls, Congress employed terms of limitation perhaps less scientific, less precise, less definite than the terms of the grant of federal power. The expression 'facilities used in local distribution' is one of relative generality. But as used in this Act it is

not a meaningless generality in the light of our history and the structure of our government. We hold the phrase to be a limitation on jurisdiction and a legal standard that must be given effect in this case in addition to the technological transmission test."

II.

The Kansas Order Does Not Conflict With Federal Power Commission Regulations

Until the Federal Power Commission filed its amicus curiae brief in this proceeding last month, that body had consistently followed its announced policy toward independent producers of strict non-interference with state regulatory practices affecting taxation and conservation. When it first promulgated its regulations over independent producers and gatherers of natural gas[8] the Commission's attention was called to the fact that such regulations might be construed to conflict with state regulation over the production and gathering of natural gas. The Commission was quick to respond, by adding to its regulations the following proviso:[9] "*Provided, however,* that nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural gas company with valid conservation orders of a state agency relating to the production or gathering of natural gas."

That the Federal Power Commission intended to observe in good faith this announced policy towards state regulation was early manifested by its uniform

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[8] 18 CFR 154.91 through 154.102, and 18 CFR 157.23 through 157.29, were issued as Federal Power Commission Order 174-A, Docket R-138.

[9] 18 CFR 157.30 (Formerly Sec. 157.28).

and unquestioning acceptance of increases in state taxes on natural gas production, where such increases were reflected by tax reimbursement clauses provided for in contracts between such producers and their pipeline purchasers. Further, on two specific occasions the Commission relaxed its existing rules and regulations with respect to rate supplements reflecting changes in such taxes. Federal Power Commission *Order No. 180*, issued June 30, 1955 (Texas tax reduction); and *Order No. 197*, issued May 23, 1957 (Kansas severance tax).

Most important to this case, however, in the Commission's apparent intent to keep faith with the states, is its unvarying acceptance of all independent producer rate filings containing a copy of the very conservation order of the State Corporation Commission of Kansas assailed in this very case.[10] Thus it appears that the federal agency has on the one hand accepted, without exception, all independent producer rates incorporating the Kansas order in question, while it asserts here publicly for the first time that such order "conflicts" with its powers over rates. It is submitted that there is no real case or controversy here, but only a tempest over a self-inflicted inconsistency. Acceptance by the Federal Commission of the Kansas order only implements and supplements the valid state regulations as a part of the "harmonious, dual system or regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere"[11]—just as the Congress visualized in enacting the Natural Gas Act.

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[10] For example see the Federal Power Commission's incompleted statement appearing on page 13 of its amicus curiae brief.

[11] *Public Utilities Company of Ohio et al.* v. *United Fuel Gas Company et al.*, 317 U. S. 456, 467.

Moreover, if there be any actual present conflict or interference in this case between the powers of the state to regulate pursuant to its traditional control over production and the Federal Power Commission's asserted "rights"—and, in view of the Commission's heretofore consistent acceptance of this order as a proper state regulatory measure, we emphatically deny that there is any present controversy or conflict between the two—then under the limited authority extended to the Federal Power Commission under its enabling statute, it is the federal body which must yield. The Federal Power Commission is not the Congress, and as this court held in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, at page 690:

> "In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp State regulatory authority. . .' Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. *Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission*

inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach." (Emphasis supplied).

CONCLUSION

We respectfully urge that the pre-1938 traditional powers of the States to regulate the production and gathering of natural gas so vitally affect the proper conservation of such states' natural resources as to render such regulation primarily a matter of local rather than of national concern; that the Congress and this court in construing the Natural Gas Act have consistently recognized the paramount concern of the states in such control; that the provisions of the Natural Gas Act are not inconsistent therewith, but on the contrary supplement and complement such states' powers over production and gathering as they previously existed prior to the passage of the Act; that under the facts and circumstances of the case, the Kansas order is a valid conservation measure which does not conflict or impinge upon any of the asserted "rights" delegated to the Federal Power Commission; and if any conflict there be, then it is created by the over-reaching of the federal agency into the prohibited areas of production regulation.

Aside from the merits of this particular case, these Attorneys General and the States they represent are seriously concerned that this case shall not prove the entering wedge for further extension of unbridled federal power into the well-established prerogatives of the individual states in the fields of local taxation and the traditional regulation of oil and gas production. As stated before, we fear the obvious and unwarranted

attempt made here by a federal agency to extend its hand into and under the soil of the producing states and thereby strangle effective local control.

THE DECISION OF THE SUPREME COURT OF THE STATE OF KANSAS SHOULD BE AFFIRMED.

Respectfully submitted,

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